

PROPOSED ORDER
OF THE DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING AND RECREATING RULES

To amend sections HFS 117.01 to 117.04 and repeal and recreate section HFS 117.05, relating to fees for copies of health care records.

Analysis Prepared by the Department of Health and Family Services

Section 146.83 (3m), Stats., as created by 2001 Wisconsin Act 109 and s. 908.03 (6m) (d), Stats., as amended by 2001 Wisconsin Act 109, requires the Department prescribe by rule fees for reproducing patient health care records that are the maximum amount a health care provider may charge. The fee limits are to be based on an approximation of actual costs. The statutes allow health care providers to also charge for postage or other delivery costs.

To develop these rules, the Department formed a 14-member advisory committee in early February, 2003. The committee consisted of equal representation of those who maintain health care records and those who request records. Over the following three months, the Department also created a website on which it posted pertinent documents for review by interested parties and encouraged persons to register to receive email notifications of new Department postings on the website.

The Department began its effort by distributing a four-page project plan to advisory committee members on February 18th. The plan stated the Department's intent "to develop a rule that complies and is consistent with what it believes to be applicable state and federal law, and is based on an approximation of actual medical record reproduction costs." Toward that end, the Department identified and shared what it considered to be the major factors and considerations. These were:

1. The recent federal Health Insurance Portability and Accountability Act (HIPAA) regulations and federal commentary related thereto, particularly the issues of:
 - a. Who, and the circumstances under which, a person will be considered someone's "personal representative" for the purposes of requesting a copy of that person's health care record; and
 - b. Whether the costs associated with record retrieval should be included in fee limits for subject persons or their personal representatives.
2. The Department's desire to approximate total health care record reproduction costs by attempting to identify the component tasks and estimated costs associated with health care record reproduction. Issues bearing on doing so include the following:
 - a. Whether and how the health care record medium affects the length of time to reproduce a record;
 - b. Whether the health care provider setting (i.e., hospital, clinic, etc.) or subject patient group (e.g., children, elderly, etc.) affects the time and effort needed to reproduce records; and
 - c. The steps involved in reproducing health care records and whether those steps are different for different record mediums and record maintainer settings.

The Department invited all committee members, and those who were "virtual" participants via the Department's website postings, to submit documents to the Department on these major

factors and considerations, asking that the documents be submitted, if possible, by March 7th. Specifically, the Department requested the following input:

1. Committee members' thoughts regarding the appropriateness and acceptability of the Department's intended approach and, if it is not, how it is not, and how and why the commenter would propose it to be different.

2. Information on the following subjects:

- How HIPAA bears on the revision of ch. HFS 117.
- Whether the categories of paper, electronic, microfilm, microfiche and traditional x-ray comprise the universe of health care record mediums for the purposes of this project, and if not, what other mediums should be addressed.
- Whether the steps involved in the reproduction of health care records within a particular health care record maintainer setting or for a particular patient group are sufficiently different to suggest a significantly different reproduction cost.
- The sequence of steps and time associated with each step typically required for health care record reproduction, by health care record medium, setting or patient group, as appropriate.
- Existing health care record fee limit policies.

After reviewing, analyzing and compiling information from about 20 documents, the Department circulated a preliminary report to committee members on March 31, 2003. The preliminary report included an initial draft of ch. HFS 117, as did the Department's subsequent iterations of the report. The Department asked that committee members and others submit comments on the Department's preliminary report by April 14th.

In response to comments it received on its preliminary report, the Department revised its preliminary report (known in its second iteration as the "interim" report) and created a table of comments and Department responses. The Department subsequently modified the comment and response table to reflect comments the Department received through April 30th. The Department circulated these documents to committee members prior to convening the first and only meeting of the advisory committee on April 25th.

In the course of the advisory committee meeting, a variety of outstanding issues were discussed. However, with one exception, there was virtually no consensus on any of the issues between members representing health care record maintainers and members representing health care record requesters. The one exception was that members encouraged the Department to develop a single fee structure to the extent possible.

Following the April 25th advisory committee meeting, the Department chose its positions on the remaining outstanding issues, revised its interim report to become its "final" report, and created a "final" iteration of its comment and response table. This initial proposed rulemaking order is the result of these efforts.

The rules limit the fee a health care provider may charge to provide duplicate health care records. The proposed fee limit varies depending on the person making the request and, in some cases, the resultant number of copies generated by the request. If an individual (or the individual's personal representative on behalf of the individual) is requesting his or her own records, the provider may charge no more than \$0.31 per page. Postage is extra. If a person is requesting another's records, the provider may charge no more than \$12.50 per request if the request generates less than five copies plus \$0.31 per page. The provider may charge no more than \$15.00 per request if the request generates five or more copies plus \$0.31 per page. The \$12.50

and \$15.00 amounts may be deemed a retrieval fee that individuals need not pay for copies of their own records.

The Department's authority to amend and repeal and recreate these rules is found in ss. 146.83 (3m) and 908.03 (6m) (d), Stats. The rules interpret ss. 146.83 (3m) and 908.03 (6m) (d), Stats.

SECTION 1. HFS 117.01 to 117.04 are amended to read:

HFS 117.01 Authority and purpose. This chapter is promulgated under the authority of ~~ss. 146.83 (3m) and 908.03 (6m) (d), Stats.,~~ to establish uniform fees that are the maximum fees that may be charged for ~~providing certified duplicate health care provider~~ a copy of health care records requested by attorneys pursuant to ~~s. 146.83 (1) (b) or (c) or 908.03 (6m) (e) 3.,~~ Stats.

HFS 117.02 Applicability. ~~This~~ Unless superseded by fees established by other applicable law, this chapter applies to all ~~attorneys~~ persons and entities who request ~~certified duplicate health care records under ss. 146.83 or 908.03 (6m) (e) 3., Stats.,~~ and to all health care providers who supply those records, either directly or indirectly through the provider's agent.

Note: An example of other applicable law is the fee limits imposed under s. 102.13 (2) (b), Stats., for worker's compensation cases.

Note: The fee limits in this chapter apply to requests for health care records whether or not a court action or administrative action has been commenced.

HFS 117.03 Definitions. In this chapter:

(1) "Department" means the Wisconsin department of health and family services.

(2) "Health care provider" ~~means a chiropractor licensed under ch. 446, Stats., a dentist licensed under ch. 447, Stats., or a health care provider as defined in s. 655.001 (8)~~ includes any persons or entities specified in ss. 146.81 (1), 655.001 (8) or 908.03 (6m) (a), Stats.

(3) "Health care ~~provider~~ records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, including any billing statements.

(4) "Personal representative" means a person who both has authority under state law to act on behalf of the patient and qualifies as a "personal representative" under 45 CFR 164.502(g).

HFS 117.04 Request for duplicate records. ~~An attorney~~ A person requesting duplicate health care ~~provider~~ records concerning a patient shall provide sufficient identifying information about the patient and the pertinent records to permit identification and location of the specific records. The request shall include all of the following:

(1) The correct name of the patient whose records are the subject of the ~~attorney's~~ request;

(2) The patient's ~~social security~~ identifying number, if known;

(3) The patient's date of birth, if known;

(4) A description of the records requested; ~~and~~.

(5) The written informed consent of the patient or person authorized by the patient to give consent to release of the records, if required by law.

SECTION 2. HFS 117.05 is repealed and recreated to read:

HFS 117.05 Fees for duplicate records. (1) DEFINITION. In this section, “x-ray copy” means a page containing one or more radiographic images.

(2) REQUESTS FOR RECORDS FROM THE PATIENT OR PERSONAL REPRESENTATIVE OF THE PATIENT. If a patient or personal representative of the patient requests duplicate copies of the patient’s health care records, the health care provider may charge no more than the following fees:

(a) For other than X-rays, all of the following:

1. Thirty-one cents per record page.
2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(b) For X-rays, all of the following:

1. \$5.25 per X-ray copy.
2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

Note: Sales taxes, if applicable, also may be added to the fee limits under this subsection.

Note: When records are needed by or on behalf of indigents, the Department encourages health care providers to provide those records at as low a cost as possible.

(3) REQUESTS FOR RECORDS FROM INDIVIDUALS OTHER THAN THE PATIENT OR THE PATIENT’S PERSONAL REPRESENTATIVE. If a person is requesting duplicate copies of another person’s health care records and the person making the request is not the personal representative of the patient, a health care provider may charge the requester no more than the following fees:

(a) For other than X-rays, all of the following:

1. a. For a request generating a total of up to 5 pages, \$12.50 per request.
- b. For a request generating a total of 5 or more pages, \$15.00 per request.
2. Thirty-one cents per record page.

Note: The “per page” fee limit under subdivision 2. above applies to the total number of pages, in addition to the “per request” fee limit.

3. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(b) For X-rays, all of the following:

1. \$5.25 per X-ray copy.

2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(c) 1. For certifying up to 5 pages, an additional \$5.00 per request.

2. For certifying 5 or more pages, \$7.50 per request.

Note: Sales taxes, if applicable, may also be added to the fee limits

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health and
Family Services

Dated:

By: _____

Helene Nelson
Secretary

SEAL: